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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners

v.

VERMILION CORPORATION,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

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IN THE SUPREME COURT OF THE UNITED STATES
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NORMAN VAUGHN, FREDDIE BROUSSARD AND
LARRY J. BROUSSARD,
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v.

VERMILION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FOR THE THIRD CIRCUIT
OF THE STATE OF LOUISIANA

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

I.

QUESTION PRESENTED

Does regulatory power under the Commerce Clause override the 5th Amendment's prohibition against taking property without compensation and thereby provide a public right of access to and use of private waterways built with private funds for private purposes on private property ?

II.

INTEREST OF AMICUS CURIAE

Presented to this Court for review as a matter of federal

law is the holding of Louisiana's Third Circuit Court of Appeal that a canal on private property constructed and maintained with private funds for private purposes is a private canal subject to private control and that the public has no right of use of the surface waters thereof even though the canal is navigable and enters other naturally navigable waterways. In rejecting Petitioners' claim of public access and holding as a matter of Louisiana law that the artificially constructed canal was not subject to a right of public use, the Third Circuit observed that since neither the Rivers and Harbors Act (33 U.S.C. § 401, et seq., herein the "RHA") nor federal common law granted individuals the unrestricted right to use a privately owned natural waterway made navigable with private funds, then *a fortiori*, the public has no right to use an artificial navigable waterway constructed with private funds. The Louisiana Appellate Court cited *United States v. Kaiser Aetna*, 408 F.Supp. 42 (D.C. Haw. 1976) in support of its conclusion that federal law did not afford the public a right of access to the canal.

Subsequent to the Louisiana Third Circuit's decision, the United States Court of Appeals for the Ninth Circuit reversed in part the District Court in *United States v. Kaiser Aetna*, by holding that federal regulatory jurisdiction under the RHA does extend to a privately owned natural waterway which is made navigable with private funds, and that a public right of use of such waterway is inseparable from federal regulatory jurisdiction under the RHA. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1977) writ granted, #78-738, U.S. Sup. Ct.

Louisiana Landowners Association, Inc. (the "Association") is a nonprofit corporation composed of 500 members who organized for the purpose of the protection and advancement of the rights of private property owners. There are numerous private waterways situated on property owned by members of the Association. Many of these waterways, including artificial canals, were constructed to provide access for mineral and timber operations, and for drainage, irrigation, reclamation, trapping and recreation activities. They were constructed and are used only with the permission and authorization of the landowner. Such waterways have historically been treated under Louisiana law as the private property of the individual landowners on whose property they are located, subject to such landowner's exclusive regulation of its use. Thus, the Association will be directly affected by the decision of this honorable Court on the issue of unrestricted public access to and use of such waterways.

Additionally, this Court's decision will affect many trappers whose income is derived from trapping operations conducted on the private property through which many such waterways have been cut. Such areas, which are usually marsh and swamp lands, harbor abundant wildlife, including waterfowl, fish, reptiles, commercial furbearing animals and other quadrupeds. Trapping commercial furbearing animals is and has been a source of livelihood for many people who have dwelled for generations on or near the property traversed by such waterways.[1] These people secure trapping rights from the property owners, usually in the form of a trapping lease, which customarily is granted for a nominal consideration.

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1. In 1978, over 12,000 trapping licenses were issued by the State of Louisiana. In 1977-78, trappers took over 3,690,000 pounds of commercial furbearing animal meat and 3,700,000 pelts, with a combined value of $13,300,000 (which was down from $24,700,000 in 1976-77). Statistics from Louisiana's Department of Wildlife and Fisheries.

The real benefit to the landowner is not the small amount of money paid by the trapping lessee; it is the trapper's possession of the landowner's property which prevents loss of title through adverse possession of others. Adverse possession is often a real problem because of the remoteness and inaccessibility of the property, which often has very few natural monuments for property lines. A trapper, however, knows his leasehold and its boundaries; and he protects his leasehold from trespassing poachers because they threaten the livelihood of himself and his family. Moreover, trappers also serve a useful conservation function by protecting the environment and by preserving other forms of wildlife from indiscriminate depletion.

If this honorable Court were to hold that private waterways, located on private property and constructed and maintained with private funds for private purposes, are subject to public access and use, the effect on the trapping industry could be devastating. It would be virtually impossible to prevent indiscriminate trespassing and poaching, with their concomitant deleterious effect on the marsh and swamp ecosystems. Since many members of the Association have granted trapping leases affecting their property, the decision of this honorable Court in this cause is of great interest to the Association for that additional reason.

III.

ARGUMENT

A.

The Exercise of Powers Derived From the Commerce Clause is Limited by the 5th Amendment

Petitioners assert that the Commerce Clause of the United

States Constitution grants a public right of access to, and use of, private property, e.g. the private waterway which is the subject of the instant litigation, without any compensation to the owner thereof. In support of their interpretation of the Commerce Clause, petitioners refer to the so-called navigation servitude doctrine, which is a jurisprudential expression of the regulatory power of the United States derived from the Commerce Clause to protect and preserve navigation upon navigable waters of the United States. *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967).

Initially, it must be recognized that the issue before this Court is not whether private waterways are subject to federal regulation; the issue is whether the Constitution or any other statutory law of the United States appropriates such private property or rights therein for public use, without compensation to the owner. This issue is strictly one of federal law, inasmuch as the private canal *sub judice*, as a matter of Louisiana law, is private property to which there is no vested right of public access or use. *Harvey v. Potter*, 19 La. Ann. 264 (1867) and *National Audubon Society v. White*, 302 So.2d 660 (La. App. 3 Cir., 1974). Louisiana's law in that respect is consistent with the general rules of property law prevailing in the United States.

> "Private canals built on private property are subject to the control of their owners the same as any other private property; the use of such canals being merely permissive, the public acquires no vested rights therein but must use them subject to such rule as the owner sees fit to impose." 12 Corpus Juris Secundum, "Canals", §31, at p. 919.

Although the Commerce Clause (art. 1, § 8, cl. 3) of the Constitution grants to the United States the power to *regulate* commerce between the states and comprehends the control of "all navigable waters of the United States" *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25, 18 L.Ed. 96, 99 (1866), nevertheless that power is limited by the 5th Amendment to the Constitution which guarantees that no person shall be deprived of property without due process of law and just compensation. "Confiscation may result from a taking of the use of property without compensation quite as well as from taking of the title." *Chicago R. I. & P.R. Co. v. United States*, 284 U.S. 80, 96, 76 L.Ed. 177, 186 (1931); cf. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 53 L.Ed. 1024 (1909). While public access to and use of navigable waters of the United States is derived from regulatory powers conferred by the Commerce Clause, in exercising that power, Congress must assure that private property rights protected by the 5th Amendment are not abridged:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.
>
> * * *
>
> "All the cases concur in holding that the power of Congress to regulate commerce, and therefore

> navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all." *Scranton v. Wheeler*, 179 U.S. 141, 153-154, 162, 45 L.Ed. 126, 133-134, 137 (1900). See also *Monongahela Navigation Company v. United States*, 148 U.S. 312, 37 L.Ed. 463 (1893).

Petitioners assert that the navigation servitude doctrine permits confiscation of private property rights in and to private waterways without compensation in the interest of public access to the same under the Commerce Clause. A brief examination of the origin and application of the navigation servitude doctrine will point up Petitioners' misapprehension of the Constitutional constraints upon powers derived under the Commerce Clause and the application of the navigation servitude where private property rights are taken as a consequence of its exercise.

B.

The Navigation Servitude is Limited by the 5th Amendment

The power to regulate commerce under the Commerce Clause confers upon the United States a "dominant servitude" over the bed and flow of "navigable waters of the United States" to aid navigation thereon and thereover. *United States v. Kansas City Insurance Co.*, 399 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967); cf. *United States v. Doughton*, 62 F.2d 936 (4th Cir. 1933). When the navigation servitude

is lawfully exercised by the United States, no compensation for damage to, or deprivation of, private property rights is required because they are subordinate to the United States' power to protect and preserve navigable waters of the United States as public highways of interstate commerce. *United States v. Kansas City Life Insurance Co.*, 399 U.S. 799; *United States v. Chicago M. St. P. & P. R. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913).

Because the application of the servitude may result in a deprivation of private property rights, this honorable Court early on mandated that it should never be exercised in a Constitutional vacuum; the limitations imposed by the 5th Amendment on any exercise of power derived from the Commerce Clause must always be observed:

> "The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give affect to that right, is so fully established, and is so amply illustrated by recent decisions of this court that a mere reference to the case will suffice * * * (Citations omitted).
>
> "(T)his rule, like every other, has its limits, and in the present case, which require us to ascertain the dividing line between public and private right, it is important to inquire what are 'navigable streams' within the meaning of the rule". . . . *United States v. Cress*, 243 U.S. 316, 320-321, 61 L.Ed. 746, 750 (1917).[2]

See also *Monongahela Navigation Company v. United States*, 148 U.S. 312, 37 L.Ed. 463 (1893); *United States v. Rands*, 389 U.S. 121. In *Monongahela Navigation Company*, this Court states:

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation." 148 U.S. at 336, 37 L.Ed.at 471.

C.

The 5th Amendment Precludes Application of the Navigation Servitude to Private Waterways

The Daniel Ball established the test of navigability of rivers and streams which constituted "navigable waters of the United States" for purposes of admiralty jurisdiction and regulatory jurisdiction under various acts of Congress as those waterways which are, in their ordinary condition, navigable in fact and form part of a continuous navigable highway of commerce between the states. *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563, 19 L.Ed. 999, 1001 (1870).

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2. This Court later limited its holding in the *Cress* case to the facts there disclosed in the decision of *United States v. Chicago, M. St. P. & P. R. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941). That limitation, however, was not directed to the 5th Amendment constraints on the exercise of the navigation servitude.

The Daniel Ball's test of navigability was modified in *The Montello*, 87 U.S. (20 Wall) 430, 22 L.Ed. 391 (1874), holding a once navigable in fact river did not lose its navigable character by reason of artificial obstructions; in *Economy Light and Power Company v. United States*, 265 U.S. 113, 65 L.Ed. 847 (1921), holding that a water body remains navigable for regulatory purposes even though it subsequently may become non-navigable because of a change in conditions or the presence of artificial constructions; and in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940) holding non-navigable waterways which could be made available for commercial interstate navigation with "reasonable improvements" to be navigable waters of the United States.

All of these cases concerned rivers and streams wholly or in substantial part navigable in their *natural* conditions, not waterways artificially created on private property; and it can hardly be argued that cutting a waterway through dry land is a "reasonable improvement" of an existing natural waterway contemplated by this honorable Court in announcing its decision in *Appalachian*.

In *United States v. Cress*, 243 U.S. 316, 61 L.Ed.746 (1917), this Court followed *The Daniel Ball* concept of navigability in speaking of those water bodies to which the navigation servitude attached, but recognized this distinction that such rivers and streams must also be navigable in their *natural* condition:

> "That the test of navigability in fact should be applied to streams in their natural condition was in effect held in The Daniel Ball, 10 Wall 577, 19 L. Ed. 999. . . .

> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interest of navigation is a natural servitude, confined to such steams as, in their ordinary and natural conditions, are navigable in fact and confined to the natural condition of the stream." *United States v. Cress*, 243 U.S. at 323-326, 61 L.Ed. at 751-752.

The *Cress* requirement of natural navigability has been adhered to in subsequent cases involving judicial recognition of the application of the navigation servitude where private property rights were taken or used as a consequence of its application. Representative of such recognition are: *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 F.680 (6th Cir. 1898); *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906); *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579 (Ct. Cl. 1975); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp. 852 (Ct. Cl. 1949); cf. *Utah v. United States*, 403 U.S. 9, 29 L.Ed. 2d 279 (1971); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978); and *Leovy v. United States*, 177 U.S. 621, 44 L.Ed. 914 (1900). In *Harrison v. Fite*, the Court stated:

> "To meet the test of navigability as understood in the American law a water course should be . . . of practical usefulness to the public as a public highway in *its natural state and without the aid of artificial means.*" 148 F. At p. 783 (Emphasis added)

Although this Court did not amplify upon its limitation of the servitude to rivers and streams in their *natural* condition in *Cress*, or in any of its subsequent decisions adhering to the requirement, the *ratio decidendi* of the limitation

seems apparent. One who takes title to the bed and/or banks of a river or stream which is navigable under *The Daniel Ball* test of navigability in *its natural condition* acquires that title subject to all advantages and disadvantages of riparian ownership, including impressment of the navigation servitude as an inchoate lien or charge on the bed, banks and surface water. Thus, the reason the 5th Amendment requires no compensation when riparian property rights in and to the bed and bank of a river or stream navigable in its natural condition are taken is because the riparian owner's title there is imperfect; this removes the 5th Amendment constraints from any taking of such riparian rights pursuant to an exercise of the navigation servitude. *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950). *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir., 1931). However, where a waterway is artificially created by construction through fast lands it obviously is not navigable in its natural condition and ownership thereof is perfect. While it may be subject to regulation, private property rights therein cannot be taken without compensation.

Analagous to this discussion of the dichotomy between private artificial waterways and rivers and streams navigable in their natural condition are the private property rights recognized with respect to toll canals. While riparian owners along rivers and streams navigable in their natural condition cannot restrict public access to such waters since they constitute waters of the United States, owners of private canals may restrict public access to the same by requiring payment of tolls for the use thereof.[3] Those toll waters obviously are

3. *Harvey v. Potter*, 19 La. Ann. 264 (1867), *Perrine v. The Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How. 172, 13 L.Ed. 92 (1850).

not subject to a navigation servitude, otherwise tolls could not be charged by the owners and operators thereof.[4]

D.

The Navigation Servitude and Regulatory Jurisdiction are Separable Concepts Because of the 5th Amendment Limitation on the Commerce Clause

The term "navigable waters of the United States has been variously defined depending upon its legal appreciation. For example, regulatory jurisdiction under the RHA has been said to extend to waters which are navigable in fact under *The Daniel Ball* standard;[5] to waters which in some areas are non-navigable in their natural and ordinary condition, but which can be made navigable in those areas with reasonable

4. See 36 Op. U.S. Atty. Gen. 203, (1930) where in denying a right to take over privately owned and constructed portions of a toll canal which formed a part of a waterway owned by the State of Illinois: ". . .Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner and deprive the latter of any investment upon it." at p. 214.

5. See *Egan v. Hart*, 168 U.S. 189, 41 L.Ed. 680 (1897); *Utah v. United States*, 403 U.S. 9, 29 L.Ed. 2d 279 (1971); *North American Dredging Co. of Nevada v. Mintzer*, 245 F.297 (9th Cir. 1917); *Gulf Interstate Ry. Co. of Texas v. Davis*, 26 F.2d 930 (S.D. Tex., 1928); *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974); *United States v. Ross*, 74 F.Supp. 6 (D.C. Mo. 1947); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp. 852 (Ct. Cl. 1949); *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978).

improvements;[6] and to certain artificial waterways which are actually used in interstate commercial activities.[7] Additionally, and perhaps most noteworthy is the scope of ecological regulatory jurisdiction over navigable waters of the United States conferred under the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1311, et seq.). The term "navigable waters of the United States" has been construed thereunder to include any waterbody, regardless of how shallow and how remote its interstate connexity may be, if activities therein have an impact on the environment, because "Congress clearly meant to extend the Act's jurisdiction to the constitutional limit. . .". *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 48 L.Ed. 2d 578 (1976); *Weismann v. Dist. Eng. U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *State of Wyoming v. Hoffman*, 437 F.Supp 114 (D. Wo. 1977). See also *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978), and cases cited therein.

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6. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940).

7. *Dow Chemical Company v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972) cert. denied, 409 U.S. 1040 (1972). In holding the artificial canal subject to RHA regulatory jurisdiction, the Fifth Circuit relied primarily on three cases concerned with the extent of Admiralty jurisdiction. See *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Dagger v. U.S.N.S. Sands*, 287 F.Supp. 939 (D.W. Va. 1968); *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F.Supp. 909 (E.D. La. 1963). These cases are questionable as analogous RHA authorities since RHA jurisdiction is underpinned by the waterway being a public highway of interstate commerce; it is not made so because the owner uses it as access to navigable waters of the United States for carriage of his own goods any more than using a private driveway for access to public highways by motor vehicle traffic can be said to grant public access to the driveway.

The 5th Amendment constitutional constraints upon the application of the navigation servitude render it much more limited in scope than the full regulatory power of Congress under the Commerce Clause. *United States v. Kansas City Life Insurance Company*, 339 U.S. 799, 94 L.Ed. 1277 (1950). Unfortunately, this limitation on the application of the doctrine has not always been carefully observed in decisions construing the scope of regulatory jurisdiction derived from the Commerce Clause over waters of the United States.

Lower courts, apparently commencing with the decision of *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910 (1971), began speaking of ecological regulatory jurisdiction under the Commerce Clause and the navigation servitude as if the two concepts were synonymous.[8] *Zabel v. Tabb* was a dredge and fill permit case in which the court held regulatory jurisdiction extended to all areas within the reach of the ebb and flow of the tide, even though those areas were not navigable in fact, nor could they become navigable with reasonable improvements, because they were subject to "the paramount servitude in the Federal government," 430 F.2d at p. 215. This decision is the first apparent application of the navigation servitude to regulate private activities

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8. See also *United States v. Stoeco Homes Inc.*, 498 F.2d 597 (3rd Cir. 1974) cert. denied 420 U.S. 927 (1974); *United States v. Cannon*, 363 F.Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F.Supp. 1132 (S.D. Ga. 1973). Prior to the decision of *Zabel v. Tabb*, the Corps of Engineers defined "navigable waters" as waters which were navigable in fact or potentially navigable with reasonable improvements. 33 C.F.R. § 209.260 (1971). Reacting to this decision and others subsequent to it, the Corps redefined its regulatory jurisdiction to include non-navigable in fact fringe areas of waters navigable in fact, i.e., to the point of ordinary high water on banks of rivers, and to the point of mean high water on shores of tidal water bodies. See 33 C.F.R. § 329, et seq. (1978).

for purposes other than to aid navigation.

While the ecological result may be correct and cause no Constitutional trauma per se because private property rights were not taken or destroyed, but only regulated, and the Commerce Clause may afford jurisdiction to the full constitutional limit to protect the environment, the equation of the navigation servitude to regulatory jurisdiction under the broadest Commerce Clause application contravenes the purpose of the servitude, which is *only* to aid navigation. *United States v. Kansas City of Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950). However, once the servitude is said to attach to a waterway, the concomitant is that private property rights can be taken without compensation. Moreover, predicating the attachment solely on ecological regulatory jurisdictional grounds without considering the potential affect on private property rights manifests the Constitutional confrontation between the 5th Amendment and the Commerce Clause caused by indiscriminate application of the servitude doctrine within the realm of regulatory jurisdiction without careful analysis of the purpose for which it is invoked.[9] And it is that Constitutional confrontation which absolutely precludes a blanket indictment of property rights

9. The navigation servitude, when it lawfully attaches to a navigable water of the United States, not only affords a right of public access to surface waters, but also permits the taking, use, dredging or flooding of the bed up to the point of ordinary high water on river banks (or mean high tide on the shore in tidal areas), all without compensation to property owners. If, as a result of such taking, improvements are destroyed or rights of access to the waterway are lost, no compensation is required, even when the livelihood of the riparian owners may be destroyed. See *United States v. Rio Grande Dam & Ins. Co.*, 174 U.S. 690, 436 L.Ed. 1136 (1899); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913); *United States v. Chicago M., St. P.P. & R.R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed. 2d 329 (1967).

under the premise that the navigation servitude and regulatory jurisdiction over waters of the United States, however defined and applied, are inseparable.[11] This, of course, is not to suggest that regulatory jurisdiction and the servitude cannot both attach simultaneously to certain water bodies; they can and do, but only where the water body is navigable in fact in its *natural* condition, and where it forms a continuous highway of interstate commerce.[12] Anything short of that will not Constitutionally sustain the servitude even though some other form of regulatory jurisdiction may Constitutionally subsist.

CONCLUSION

Private property rights have become obscured in a regulatory cloud. A private artificial water body, constructed with

11. The private waterway which is the subject of this suit may in fact be subject to regulatory jurisdiction of some kind or description. However, that certainly does not mean that the navigation servitude is inseparable from that jurisdiction. It is respectfully submitted that the holding of the Ninth Circuit Court of Appeal in that regard in *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1978) (cert. granted #78-738 on the Docket of this honorable Court) which is predicated solely on ecological jurisdictional cases defining waters of the United States under the Federal Water Pollution Control Act Amendments of 1972 (33 USC 1311 et seq.) is erroneous and should be reversed.

12. As an incident of power derived under the Commerce Clause, Congress legislated that all "navigable waters" within Territories of Louisiana and Orleans are public highways. Act of Feb. 15, 1811, Ch. 14, Sec. 12 (33 USC §10); see also Act of April 8, 1812, Ch. 50 Sec. 1, 2 Stat 701 declaring the Mississippi River and all navigable waters flowing into the same and the Gulf of Mexico to be public highways. These Acts, if they are to strike the necessary Constitutional balance between the 5th Amendment and the Commerce Clause, must be held to be limited by *The Daniel Ball* standard of navigability, eg. navigable in fact in their ordinary conditions and highways of interstate commerce, or they are unconstitutional under the mandates of *Scranton v. Wheeler*, 179 U.S. 141; *Cress*, 243 U.S. 316; and *Monongahela Navigation Company*, 148 U.S. 312.

private funds on private property for private purposes, is no different under the Constitution than a private road on private property which connects with public highways. It makes no sense to say the former is subject to a public right of access and use when we know the latter clearly is not. The regulatory cloud cast on private property rights must be dispersed with clear recognition that navigable waters subject to regulation in aid of navigation as public highways under the Commerce Clause do not include private waterways; access to and use of the same are private property rights which can not be taken without compensation. Petitioner's assertion that the private waterway which is the subject of this suit is subject to a public right of access and use will not pass Constitutional muster, for the result is tantamount to a confiscation of private property rights without compensation in violation of the 5th Amendment to the Constitution.

The decision of the Louisiana Third Circuit Court of Appeal treating Respondent's private canal as private property not subject to public access and use is eminently correct as a matter of Louisiana law; it is respectfully submitted it is also correct as a matter of federal law, and should be maintained by this honorable Court.

Respectfully submitted,

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